Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–415–08 OF 2018
ZABARIAH YUSOF, RHODZARIAH BUJANG AND LAU BEE LAN JJCA
25 MARCH 2019

Criminal Procedure — Gag order — Sub judice rule — Application for pre-trial gag order by appellant — Appeal against decision of trial judge in dismissing appellant's application for pre-trial gag order — Whether court had jurisdiction to issue prior gag order — Whether sub judice rule applied — Whether appellant made out case to warrant prior restraint order — Whether learned trial judge erred in dismissing application after agreeing on submission by counsel for appellant

This was an appeal against the decision of the learned High Court judge in dismissing the application of the appellant (applicant in the court below) for an order to prevent the media and the public from discussing the merits of several criminal charges which were preferred against the appellant until the conclusion of the trial proceedings. The appellant was accused of seven charges relating to offences committed under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 and the Anti-Money Laundering, Anti-Terrorism Financing and Proceedings of Unlawful Activities Act 2001. The appellant sought the order on the basis that: (a) there was a risk of a substantial prejudice to the appellant; (b) there were no other alternative remedy or measures that could be engaged to ensure that the appellant would receive a fair trial; and (c) the gag order would be proportionate and would not affect nor impinge the freedom of expression by the media as compared to the right of an accused to a fair trial. The respondent argued that the court did not have jurisdiction to grant such an order, there were other remedies or measures available to the appellant rather than the prior restraint or pre-emptive order, and that sub judice rule would be inapplicable due to the absence of jury trials in this country. The respondent also contended that a gag order would infringe art 10 of the Federal Constitution. The learned High Court judge found that: (a) the court had the authority to issue a prior restraint gag order against prejudicial publications or discussions which affects a fair trial and subvert due administration of justice; (b) the subjudice rule applied in Malaysia, despite the absence of jury trials in this country; and (c) the appellant failed to make out a case to warrant a prior restraint gag order. Hence, this appeal.

Held, dismissing the appeal and affirming the decision of the learned trial judge:

(1) In the absence of any express provision in the statutes as to the granting of prior restraint gag order against prejudicial publications, premised on art 126 and s 13 of the Courts of Judicature Act 1964 ('the CJA 1964') (read together with art 10 of the Federal Constitution) which empowered the courts to punish for contempt, it also enabled the courts, the authority to grant a prior restraint against prejudicial discussions or publications affecting the fair trial and the due administration of justice, subject to considerations (see para 30).

(2) *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 and *Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 reaffirmed the principle that judicial power rested with the judiciary and no other and it continued to be enshrined in art 121(1) of the Federal Constitution. The criminal trials in this country was being conducted by a judge sitting alone, who was duty bound to only consider the evidence that was before the court. As such, the likelihood of prejudice from negative publications would not have its effect in a non jury trial of the appellant. Based on the above, there was no flaw in the reasoning of the learned trial judge and the court was in agreement that the sub judice rule applied despite the absence of jury trials nowadays (see paras 36 & 40).

(3) Based on the exhibits, the widespread pervasive and accusatory publicity that was generated and probably by the Sarawak Report had been in the public domain as far back as 2014. These publications had been there for a long time, thus negating the element of immediacy of the threat of real risk of serious prejudice to a fair trial of the appellant. There was nothing in the publicity that cast aspersions on the integrity of the administration of the criminal justice system and neither was there a threat to the character and status of the court as a court of justice. Neither would it have an effect on the rights of the appellant in having a fair trial. Therefore, banning discussions and publications of matters concerning the proceedings in terms of the application as per the notice of motion, would potentially infringe the fundamental rights principle of open justice system as encapsulated in s 15 of the CJA 1964 which required the court to be open and public. Additionally, the prior restraint order sought for by the applicant lacked precision and too wide in scope and could not be enforced effectively and especially reports published outside the country but were readable and accessible by the public in the country. It was also to be observed that the scope of the gag order stated in the notice of motion was inconsistent with the averments in the affidavit in support of the applicant, which showed that the application was not supported by the affidavit in support (see paras 44, 49, 54 & 58–59).

(4) The learned trial judge's conclusion on the jurisdiction issue and the sub judice issue did not determine the application in favour of the appellant.

Although the issues were decided in accord to the submission by the counsel of the appellant, however the appellant failed to meet the threshold for a prior restraint or a pre-emptive gag order to be granted. Hence, the argument in this regard, by the appellant had no basis. The court could not, by any account agreed with the submission that based on the grounds of the learned trial judge, it was imperative on the court to allow the appeal (see paras 64 & 66).

(5) The invocation of s 60(1) of the CJA 1964 and the omnibus prayer 4 in the notice of motion to allow for specific directions to be issued out for prayer 1 in the notice of motion, was inappropriate as the appellant failed to establish that he was entitled to the relief prayed for, namely the prior restraint gag order. Therefore, there was sufficient judicial appreciation by the learned trial judge of the facts and evidence before him and that it had not been shown where he had gone wrong in arriving at his decision. His findings were supported by the evidence and the authorities and there had been no misdirection in law or that he had misdirected himself. He had taken a positive evaluation of the evidence before him and careful analysis of the authorities submitted. Therefore, the findings of the learned trial judge did not warrant any appellate intervention (see paras 72–73).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana dalam menolak permohonan perayu (pemohon di mahkamah bawahan) untuk satu perintah untuk menghalang media dan orang awam daripada membincangkan merit beberapa dakwaan jenayah yang dikenakan terhadap perayu sehingga tamat prosiding perbicaraan. Perayu dituduh tujuh pertuduhan yang berkaitan dengan kesalahan yang dilakukan di bawah Kanun Keseksaan, Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan Akta Pencegahan Pengubahan Wang Haram, Pencegahan Pembiayaan Keganasan dan Hasil daripada Aktiviti Haram 2001. Perayu memohon perintah berdasarkan: (a) terdapat risiko prejudis yang substansial kepada perayu; (b) tiada sebarang remedi alternatif atau langkah yang boleh diambil untuk memastikan perayu akan menerima perbicaraan yang adil; dan (c) perintah sekatan akan berpatutan dan tidak akan menjejaskan atau membebaskan kebebasan bersuara oleh media berbanding dengan hak seseorang tertuduh untuk perbicaraan yang adil. Responden berhujah bahawa mahkamah tidak mempunyai bidang kuasa untuk memberikan perintah sedemikian, terdapat remedi atau langkah-langkah lain yang tersedia kepada perayu berbanding sekatan sebelum atau perintah pra-matang, dan peraturan sub judice itu tidak boleh digunakan kerana ketiadaan perbicaraan juri di negara ini. Responden juga berpendapat bahawa perintah sekatan akan melanggar perkara 10 Perlembagaan Persekutuan. Hakim Mahkamah Tinggi yang bijaksana mendapati bahawa: (a) mahkamah mempunyai kuasa untuk mengeluarkan

satu perintah sekatan sebelum terhadap penerbitan atau perbincangan yang menjejaskan perbicaraan adil dan menindas pentadbiran keadilan; (b) peraturan sub judice digunakan di Malaysia, walaupun tiada perbicaraan juri di negara ini; dan (c) perayu gagal membuat kes untuk menjamin perintah sekatan sebelum. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dan mengesahkan keputusan hakim bicara yang bijaksana:

(1) Dengan ketiadaan apa-apa peruntukan nyata dalam undang-undang mengenai pemberian perintah sekatan sebelum terhadap penerbitan yang menjejaskan, berdasarkan perkara 126 dan s 13 Akta Mahkamah Kehakiman 1964 ('Akta') (dibaca bersama dengan perkara 10 Perlembagaan Persekutuan) yang memberi kuasa kepada mahkamah untuk menghukum kerana penghinaan, ia juga membolehkan mahkamah, kuasa memberikan sekatan sebelum terhadap perbincangan atau penerbitan yang menjejaskan perbicaraan yang adil dan pentadbiran keadilan yang wajar, tertakluk kepada pertimbangan (lihat perenggan 30).

(2) *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 dan *Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 menegaskan prinsip bahawa kuasa kehakiman terletak di tangan badan kehakiman dan tidak yang lain dan terus termaktub dalam perkara 121(1) Perlembagaan Persekutuan. Perbicaraan jenayah di negara ini dijalankan oleh seorang hakim, yang bertugas hanya untuk mempertimbangkan bukti yang ada di hadapan mahkamah. Oleh itu, kemungkinan prejudis daripada penerbitan negatif tidak akan memberi kesan dalam perbicaraan tanpa juri perayu. Berdasarkan perkara di atas, tiada kecacatan dalam alasan hakim bicara yang bijaksana dan mahkamah bersetuju bahawa peraturan sub judice digunakan meskipun tiada perbicaraan juri ketika ini (lihat perenggan 36 & 40).

(3) Berdasarkan ekshibit, publisiti yang luas merebak dan menuduh yang dihasilkan dan mungkin oleh Sarawak Report telah berada dalam domain awam setakat 2014. Penerbitan ini telah lama wujud, dengan itu menafikan unsur kehadiran ancaman risiko sebenar prejudis yang serius terhadap perbicaraan adil perayu. Tiada apa-apa dalam publisiti yang mencemarkan kepentingan integriti pentadbiran sistem keadilan jenayah dan tiada ancaman kepada watak dan status mahkamah sebagai mahkamah keadilan. Ia juga tidak memberi kesan ke atas hak perayu dalam mempunyai perbicaraan yang adil. Oleh itu, larangan perbincangan dan penerbitan mengenai perkara-perkara yang berkaitan dengan prosiding dari segi permohonan seperti notis usul, akan berpotensi melanggar prinsip hak asasi sistem keadilan terbuka

sebagaimana diungkapkan dalam s 15 Akta yang mengharuskan mahkamah untuk terbuka dan awam. Di samping itu, parintah sekatan sebelum yang dipohon oleh pemohon tidak mempunyai ketepatan dan terlalu luas dalam skop dan tidak boleh dikuatkuasakan dengan berkesan dan terutama laporan yang diterbitkan di luar negara tetapi boleh dibaca dan boleh diakses oleh orang awam di negara ini. Adalah juga diperhatikan bahawa skop perintah sekatan yang dinyatakan dalam notis usul tidak konsisten dengan pengakuan afidavit yang menyokong pemohon, yang menunjukkan bahawa permohonan itu tidak disokong oleh afidavit sokongan (lihat perenggan 44, 49, 54 & 58–59).

(4) Kesimpulan hakim bicara yang bijaksana mengenai isu bidang kuasa dan isu sub judice tidak menentukan permohonan yang memihak kepada perayu. Walaupun isu-isu tersebut diputuskan selaras dengan hujahan peguam perayu, namun perayu gagal memenuhi nilai ambang untuk sekatan sebelum atau perintah sekatan pra-matang untuk diberikan. Oleh itu, hujahan dalam hal ini, oleh perayu tidak mempunyai asas. Mahkamah tidak boleh, oleh mana-mana huraian bersetuju dengan hujahan yang berdasarkan alasan hakim bicara yang bijaksana, adalah penting bagi mahkamah untuk membenarkan rayuan (lihat perenggan 64 & 66).

(5) Permohonan s 60(1) Akta dan permohonan omnibus 4 dalam notis usul untuk membenarkan arahan khusus dikeluarkan untuk permohonan 1 dalam notis usul, adalah tidak sesuai kerana perayu gagal untuk membuktikan bahawa beliau berhak atas relif dipohon untuk, iaitu perintah sekatan sebelum. Oleh itu, terdapat penghakiman yang mencukupi oleh hakim bicara yang bijaksana tentang fakta dan keterangan di hadapan beliau dan bahawa ia tidak ditunjukkan di mana beliau telah salah dalam membuat keputusannya. Penemuan beliau disokong oleh keterangan dan autoriti dan tiada salah arah dalam undang-undang atau bahawa beliau telah tersalah arah. Beliau telah mengambil penilaian positif terhadap keterangan di hadapan beliau dan analisis yang teliti terhadap autoriti yang dikemukakan. Oleh itu, penemuan hakim bicara yang bijaksan tidak mewajarkan apa-apa campur tangan rayuan (lihat perenggan 72–73).]

Cases referred to

Attorney General v Leveller Magazine Ltd and others [1979] 1 All ER 745, HL (refd)
Attorney General v Times Newspapers Ltd [1973] 3 All ER 54, HL (refd)
Chiu Nang Hong v PP [1965] 1 MLJ 40, PC (distd)
Dagenais v Canadian Broadcasting Corporation [1994] 3 SCR 835, SC (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Ganesh Ram v Baikunthesh Prasad Singh & Ors AIR 1951 Pat 291, HC (refd)

Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors [1996] 3 MLJ 489, FC (refd)
Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, FC (refd)
Johnbosco Chinedu Augustine v PP [2016] MLJU 1685; [2016] 3 CLJ 732, CA (refd)
Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh [1997] 1 MLJ 789, FC (refd)
Lee Kwan Kwoh v PP [2009] 5 CLJ 631, FC (refd)
Loot Ting Yee v Tan Sri Sheikh Hussain bin Sheikh Mohamed & Ors [1982] 1 MLJ 142, FC (refd)
Near v Minnesota (1931) 283 US 697, SC (refd)
Nebraska Press Association v Hugh Stuart (1976) 427 US 539, SC (refd)
Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors) [2004] 3 MLJ 301, CA (refd)
Sahara India Real Estate Corporation Ltd & Ors v Securities & Exchange Board of India & Anor CA No 9813 of 2011, CA (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case [2017] 3 MLJ 561, FC (refd)
Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor [2012] 7 MLJ 657, HC (refd)
UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal [2010] MLJU 2179; [2010] 9 CLJ 785, FC (refd)
Vincent Ross Siemer v The Solicitor General [2013] NZSC 68, SC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceedings of Unlawful Activities Act 2001
Bill of Rights Act [NZ]
Canadian Constitution [CN] s 1
Contempt of Court Act 1971 [IND]
Contempt of Court Act 1981 [UK] s 4(2)
Courts of Judicature Act 1964 ss 13, 15, 60(1), (4), 69(4)
Federal Constitution arts 10, 121(1), 126
Indian Civil Procedure Code [IND] O 41 r 33
Indian Constitution [IND] arts 19, 19(2), 21, 129, 215
Malaysian Anti-Corruption Commission Act 2009
Penal Code
US Constitution [US]

Appeal from: Criminal Application No 44–115–07 of 2018 (High Court, Kuala Lumpur)

Muhammad Shafee Abdullah (Harvinder Jit Singh, Sarah Maalini Abishegam, Farhan Read, Alfirdaus Shahrul Naing, Wan Aizuddin Wan Mohammed, Rahmat Hazlan, Muhammad Farhan Shafee, Wee Yeong Kang, Syahirah Hanapiah and Zahria Eleena Redza with him) (Shafee & Co) for the appellant.

Tommy Thomas (V Sithambaram, Sulaiman Abdullah, Manoj Kurup, Donald Joseph Franklin and Izzat Fauzan with him) (Attoney General's Chambers) for the respondent.

Zabariah Yusof JCA:

[1] This is an appeal against the decision of the learned High Court judge in dismissing the application of the appellant (applicant in the court below) for an order to prevent the media and the public from discussing the merits of several criminal charges which were preferred against the appellant until the conclusion of the trial proceedings.

[2] We are guided by the trite principle of law of the limited role of an appellate court in determining an appeal that is before it. Appellate intervention is only warranted when the trial court had committed an error of law and fact. It is the duty of an appellate court to intervene and set right the decisions of the trial court if they are unjust or are plainly wrong, or if the trial court had misdirected itself fundamentally on points of law and evidence, such that no reasonable court of first instance would have reached the same conclusion (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; *UEM Group Berhad (Dahulunya Dikenali Sebagai United Engineers (Malaysia) Berhad) v Genisys Integrated Engineers Pte Ltd & UEM Genisys Sdn Bhd and another appeal* [2010] MLJU 2179; [2010] 9 CLJ 785).

[3] With that in mind, we have considered the oral and written submissions of the parties, the grounds of judgment of the learned trial judge that dismissed the application in the court below. We found that the learned trial judge did not err in deciding to dismiss the application by the appellant.

[4] We therefore unanimously dismissed the appeal and affirmed the decision of the learned trial judge. Herein below are our full grounds, for so doing.

THE NATURE OF THE ORDER SOUGHT FOR BY THE APPELLANT IN THE NOTICE OF MOTION

[5] In seeking for the application, the appellant filed a notice of motion for the following order:

1. A *direction be hereby issued* that pending disposal of the proceedings in

Kuala Lumpur High Court Arrest Case No WA-45-2-07/2018 and Arrest Case No: WA-45-3-07/2018 (the proceedings), any person who shall publish and/or cause to be published in the media, to wit any broadcast and/ or other communication in whatever form which is addressed to the public at large or any section thereof, any words, comments, discussions and/or statements, *which would suggest, conclude or infer that Dato' Sri Najib Bin Hj Abdul Razak has undertaken any of the acts outlined in the four (4) charges in the Proceedings*, as annexed in Annexure A hereof and/or is guilty of the offences outlined therein, shall be liable to being punished for contempt of this Honourable Court; (Emphasis added.)

2. An order be hereby granted that pending disposal of the Proceedings, no person shall publish and/ or other communication in whatever form which is addressed to the public at large or any section thereof, any words, comments, discussions and/or statements, *which would suggest, conclude or infer that Dato' Sri Mohd Najib Bin Hj Abdul Razak has undertaken any of the acts outlined in the four (4) charges in the Proceedings*, as annexed in Annexure A hereof and/or is guilty of the offences outlined therein; (Emphasis added.)

3. That the Applicant and the respondent be at liberty to apply to enforce the order provided for herein; and

4. Any further relief or order that this Honourable Court deems fit and proper to be given in the interest of justice.

Essentially, the appellant is seeking for a prior restraint gag order to stop any future publication and discussion on the merits of the criminal charges already filed against the appellant in a legal proceeding, which the appellant alleged have an impact to his right of a fair trial.

[6] The nature of the order sought are for the following:

(a) directions from the court to be issued to the public pending disposal of the proceedings that anybody who committed the specified acts (of publishing, broadcasting etc to the public any comments, words, discussions etc) shall be liable to being punished for contempt;

(b) to cite for contempt *any person* deemed to have committed the acts stated therein; and

(c) to bar any person from committing the acts specified therein, namely *publishing or communicating in whatever form* any *words, comments, discussions or communicates in whatever form*, which is addressed to the public at large or any section thereof, any words, comments or discussions or statements which would *suggest the applicant had undertaken any of the matters stated in the criminal charges* filed against him.

[7] The prayers sought is directed against 'any person' who publishes or is

involved in the publication of any offending article. It also covers any form of publication in whatever media due to the words 'in whatever form'.

[8] The form of the offending article/material envisaged in the notice of motion is 'any words, comments, discussions and/or statements ...'. The offending materials or article covers or includes any form of reporting on the case in whatever form it may take and not merely limited to reporting, reproducing words or statements, discourse, discussions or remarks. Essentially any utterance on the case will be caught by the order sought.

[9] The phrase in prayers 1 and 2 of the notice of motion which states '... which suggest, conclude or infer that Dato' Sri Mohd Najib bin Haji Abd Razak has undertaken any of the acts ... and/ or is guilty of the offences outlined therein ...' only seek for an order to bar persons who takes part in any form of publication in whatever manner that suggests the guilt of the appellant, not on the innocence of the appellant.

THE APPELLANT'S CASE

[10] The appellant is accused of seven charges relating to offences committed under the Penal Code, the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act 2009') and the Anti-Money Laundering, Anti-Terrorism Financing and Proceedings of Unlawful Activities Act 2001 ('the AMLATFA'). All charges were ordered to be jointly tried and the trial is to commence from 12 February 2019–29 March 2019.

[11] An interim gag order had been put in effect at the conclusion of an oral application after the initial four charges were read on 4 July 2018. A subsequent formal application was filed and fixed for hearing on 10 August 2018.

[12] While the appellant had no issue with accurate reporting and articles that were fair, factually accurate, and published contemporaneously in good faith, the motion is for an order to prevent publication of opinions on guilt and the character of the appellant, as well as those of the witnesses, and to prevent discussions on the merits predicting or even influencing the outcome of the trial.

[13] The appellant sought the order on the basis that:

(a) there was a risk of a substantial prejudice to the appellant given the appellant's claim of the media coverage surrounding his wrongdoings having the effect of presupposing his guilt and the risk affecting the due administration of judicial authority due to pretrial unrestrained publicity;

A (b) there were no other alternative remedy or measures that could be engaged to ensure that the appellant would receive a fair trial; and

(c) the gag order would be proportionate and would not affect nor impinge the freedom of expression by the media as compared to the right of an accused to a fair trial.

B

THE RESPONDENT'S ARGUMENT

[14] The court does not have jurisdiction to grant such an order and that this was not a proper case for the court to invoke its inherent powers, as the orders sought for, is directed to the world at large. For such an order, namely to direct the world at large, there must be an express power conferred by legislation for the court to grant.

C

D **[15]** The overriding principle for this court to consider is whether the order is necessary for avoiding a substantial risk of prejudice to the administration of justice. There was no substantial risk of prejudice to the administration of justice.

E **[16]** There are other remedies or measures available to the appellant rather than the prior restraint or pre-emptive order, namely the availability of defamation laws or to go for contempt against wrongdoers.

F **[17]** The respondent also argued that sub judice rule would be inapplicable due to the absence of jury trials in this country.

[18] In Malaysia, where the criminal trials are conducted by a judge sitting alone, cases will be decided by the judge based on the evidence that will be adduced before the judge. Witnesses will give evidence in court before the judge who will evaluate the credibility of the said witnesses. It is the judge who decide the cases based on his evaluation of the witnesses' evidence and documentary evidence. Moreover, there is the various tiers of the court where the appellant would have his day in court until the highest apex court in the country.

G

H

[19] The respondent contended that a gag order would infringe art 10 of the Federal Constitution. In any event, it would be in vain as it would potentially not bind the international media.

I

ISSUE

[20] Essentially there are two issues raised by parties:

(a) whether the court has jurisdiction to issue the prior restraint gag order in the form that the appellant is seeking; and

(b) whether the sub judice rule applies in our jurisdiction. Sub judice is part of the law of contempt which in turn is concerned with the interference of due administration of justice and the legal process which invariably extends to the right of an accused person to a fair trial.

FINDINGS OF THE HIGH COURT

[21] The learned High Court judge found that:

(a) the Malaysian courts has the authority to issue a prior restraint gag order against prejudicial publications or discussions which affects a fair trial and subvert due administration of justice;

(b) the subjudice rule applies in Malaysia, despite the absence of jury trials in this country; and

(c) the appellant failed to make out a case to warrant a prior restraint gag order.

OUR DECISION

Whether the court has jurisdiction to issue a prior gag order

[22] There is no specific provision in the Malaysian law that authorise the granting of a gag order in the nature of a prior restraint or a pre-emptive order against prejudicial publications unlike the UK as can be found in s 4(2) of their Contempt of Court Act 1981 which provides:

> *4 Contemporary reports of proceedings.*
>
> (1) Subject to this section a person is not guilty of contempt of court under the strict liability rule in respect of a fair and accurate report of legal proceedings held in public, published contemporaneously and in good faith.
>
> (2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, *be postponed* for such period as the court thinks necessary for that purpose. (Emphasis added.)

This provision enables the courts in UK to grant a prior restraint or pre-emptive order in the form of 'postponement orders'.

[23] In determining whether the courts in this country has the jurisdiction to grant a prior restraint gag order, the learned judge had examined the position in other Commonwealth jurisdictions in dealing with application of a prior restraint gag order. Various jurisdictions referred to this so called 'gag order' in different terms. Essentially, it is a prior restraint order of contempt.

[24] In India, although the Contempt of Court Act 1971 does not expressly empower the court to issue prior restraint orders in anticipation of prejudicial publication, the Supreme Court in *Sahara India Real Estate Corporation Ltd & Ors v Securities & Exchange Board of India & Anor* CA No 9813 of 2011, held that the courts have the power to issue postponement orders to prevent prejudicial publication when the situation warrants it. In an illuminating judgment, the Supreme Court had examined the relationship between the Indian constitutional provisions on contempt in arts 129 and 215 and the art 19 which imposes reasonable restrictions over fundamental liberties and held that:

> 21 ... Thirdly, if one reads *Article 19(2)* with the second part of *Article 129* or *Article 215*, it is clear that the contempt action does not exhaust the powers of the Court of Record. The reason being that contempt is an offence sui generis. Common law defines what is the scope of contempt or limits of contempt. *Article 142(2)* operates only in a limited field. It permits a law to be made restricted to investigations and punishment and does not touch the inherent powers of the Court of Record. Fourthly, *in case of criminal contempt, the offending act must constitute interference with administration of justice*. Contempt jurisdiction of courts of record forms part of their inherent jurisdiction under *Article 129/Article 215.Superior Courts of Record have inter alia inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts. The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial.* It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the 'real and substantial risk of serious prejudice' to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. The principle underlying postponement orders is that it prevents possible contempt. Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect. Such postponement orders operate on actual publication. Such orders direct postponement of the publication for a limited period. *Thus, if one reads Article 19(2), Article 129/Article 215 and Article 142(2), it is clear that Courts of Record 'have all the powers including power to punish' which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content*. Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same time such neutralising devices or techniques evolved by the Courts effectuate a balance between conflicting public interests. It is well settled that precedents of this Court under *Article 141* and the Comparative Constitutional law helps courts not only to understand the provisions

of the Indian Constitution it also helps the Constitutional Courts to evolve principles which as stated by Ronald Dworkin are propositions describing rights [in terms of its content and contours] (See 'Taking Rights Seriously' by Ronald Dworkin, 5th Reprint 2010). The postponement orders is, as stated above, a neutralising device evolved by the courts to balance interests of equal weightage, vis, freedom of expression vis a vis freedom of trial, in the context of the law of contempt. One aspect needs to be highlighted. The shadow of the law of contempt hangs over our jurisprudence. The media, in several cases in India, is the only representative of the public to bring to the notice of the court issues of public importance including governance deficit, corruption, drawbacks in the system. *Keeping in mind the important role of the media, Courts have evolved several neutralising techniques including postponement orders subject to the twin tests of necessity and proportionality to be applied in cases where there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such orders would also put the Media to notice about possible contempt.* However, it would be open to Media to challenge such orders in appropriate proceedings. Contempt is an offence sui generis. *Purpose of Contempt Law is not only to punish. Its object is to preserve the sanctity of administration of justice and the integrity of the pending proceeding*. Thus, the postponement order is not a punitive measure, but a preventive measure as explained hereinabove. Therefore, *in our view, such orders of postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement of justification under Article 19(2) and they also help the Courts to balance conflicting societal interests of right to know vis-à-vis another societal interest in fair administration of justice*. One more aspect needs to be mentioned. *Excessive prejudicial publicity leading to usurpation of functions of the Court not only interferes with administration of justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such case, Courts are duty bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by this Court as a human right under Article 21, subject to the applicant proving displacement of such a presumption in appropriate proceedings. Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case. For aforestated reasons, we hold that subject to above parameters, postponement orders fall under Article 19(2) and they satisfy the test of reasonableness.*

The long and short of it is that the Supreme Court held that due to the power given to the courts in India to render punishment for contempt in itself also renders the courts the power to issue prior restraint gag orders in the form of postponement orders in appropriate cases. It is derived from arts 129 and 215 of the Indian Constitution which empower the Supreme Court and the High Courts to punish people for their respective contempt. The court went on the doctrine of clear and present danger as a basis of the balance of convenience test as the case involved the lifting of an injunction. These postponement orders constitute reasonable restrictions against fundamental rights and liberties which would be saved under art 19(2) of the Constitution of India. Article 19(2) authorised the government to impose reasonable restriction upon

A the freedom of speech and expressions 'in the interest of public order'. The reason behind this is that while it is necessary to maintain and preserve freedom of speech and expression in a democracy, it is also necessary to place some curbs on this freedom to maintain social order. Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.

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[25] New Zealand issues pre restraint order in the form of a suppression order where the Supreme Court in *Vincent Ross Siemer v The Solicitor General* [2013] NZSC 68 has taken the position that the New Zealand courts has the powers to issue a suppression order which is consistent with the Bill of Rights Act which represents the balance between the freedom of expression and the fair trial rights. There is however, pre requisites for such a suppression order to be issued, namely, that the publication of the material would create a real risk of prejudice to a fair trial, and that it is rationally connected to the objective of protecting a fair trial rights. Where there is a real risk of a fair trial being negated, a pre-emptive but temporary publication ban is considered as a reasonable and proportionate limit on freedom of expression. The scope of such suppression order (eg the material suppressed and the duration of the order) should be clearly defined to ensure that freedom of speech is curtailed only to the extent reasonably necessary to preserve fair trial rights.

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[26] The case of *Nebraska Press Association v Hugh Stuart* (1976) 427 US 539 was referred to, by all parties including the learned High Court judge in support of a prior restraint order. The Supreme Court in *Nebraska Press Association v Hugh Stuart* held that prior restraint may be issued when it is shown to be necessary to prevent the dissemination of prejudicial publicity that poses a clear threat to the fairness of the trial. Justice Powell at p 2808 para 571 held:

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> in my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious.

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The learned judge in *Nebraska Press Association v Hugh Stuart* further went on to hold at p 2809:

> I would hold, however that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is

accorded the accused without necessitating so drastic an incursion on the equally fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors.

US cases are instructive, given their First Amendment which does not tolerate any form of restraint on freedom of the press, and freedom is expressly protected as an absolute right. The US Constitution does not have provisions similar to s 1 of the Charter Rights under the Canadian Constitution nor is such freedom subject to reasonable restrictions as art 19(2) of the Indian Constitution. Hence, in US, any interference with the media freedom to access, report and comment upon ongoing trials is prima facie unlawful. Prior restraints are rarely imposed. Instead they have neutralising devices to deal with irresponsible piece of journalism which results in prejudice to any proceedings, as the legal system does not provide for sanctions against the parties responsible for the wrongdoings. Restrictive contempt of court laws is generally considered incompatible with the constitutional guarantee of free speech. Courts in US have evolved procedural devices aimed at neutralising the effect of prejudicial publicity like change of venue, ordering re-trial or reversal of conviction on appeal. Thus in US, there is no absolute rule against 'prior restraint', however, its necessity has been recognised, albeit in very exceptional cases (see *Near v Minnesota,* (1931) 283 US 697) by the courts in devising neutralising techniques.

[27] The learned trial judge also referred to the Canadian case of *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835 which lays down the approach to be taken in the constitutional interpretation of media freedom and freedom of expression. It was held that the common law rules in relation to sub judice rule has to be formulated to such an extent in light of fundamental liberties provisions in the constitution. The Canadian courts held that a publication ban should only be ordered when:

(a) such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably alternative measures will not prevent the risk; and

(b) the effects of the publication ban outweigh the effects to the free expression of those affected by the ban.

[28] In Malaysia, the provision on contempt found its way in art 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964 which empowers the courts to punish any contempt of itself.

[29] Hence, the learned trial judge:

A (a) after examining the position of other jurisdictions like India, New Zealand and Canada, in dealing with postponement orders and suppression orders;

(b) in light of art 126 of the Federal Constitution; and

B (c) to take a prismatic approach in the construction of the constitutional provisions as formulated in *Lee Kwan Kwoh v Public Prosecutor* [2009] 5 CLJ 631,

C has concluded that Malaysian Courts are empowered to issue a prior restraint order against prejudicial publications or discussions which affects a fair trial and subvert the due administration of justice.

[30] We do not find any flaw in the conclusion by the learned trial judge D based on his evaluation of the aforesaid cases in various jurisdictions especially in *Sahara India Real Estate Corporation Ltd & Ors v Securities & Exchange Board of India & Anor* which examined the relationship of their arts 129 and 215 with art 19(2) which is similar to our art 126 and s 13 of the Courts of Judicature Act 1964 and our art 10 of the Federal Constitution respectively. He is not plainly E wrong in concluding as such. Therefore, in the absence of any express provision in the statutes as to the granting of prior restraint gag order against prejudicial publications, premised on arts 126 and s 13 of the Courts of Judicature Act 1964 (read together with art 10 of the Federal Constitution) which empower the courts to punish for contempt, it also enables our courts, the authority to F grant a prior restraint against prejudicial discussions or publications affecting the fair trial and the due administration of justice, subject to considerations. The question is, what are these considerations.

THE PRE-REQUISITE FOR A PRIOR RESTRAINT GAG ORDER

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[31] A pre-emptive or a prior restraint gag order, is an order in anticipation of a contemptuous act being committed, as compared to an act already committed and contempt proceedings ensued. Due to the very nature of the order sought herein in the form of a prior restraint, the threshold is high and H the burden is formidable for the applicant to make out a case for the court to grant such an order. In *Sahara India Real Estate Corporation Ltd*, the pre-requisite is that the risk as being 'clear and present danger' as well as 'immediate'. In *Nebraska Press Association v Hugh Stuart*, it ruled that 'prior restraint is permissible only if narrowly tailored to avoid 'a clear and present I danger or serious and imminent threat' to a competing interest, namely the freedom of the press.

[32] After distilling the considerations from the aforementioned cases as to the pre requisite of a prior restraint gag order, the learned trial judge formulated

that there must be the time element of the immediate risk or threat of the prejudice to the fair trial of the accused. This is pertinent, given that the order sought involves a pre-emption and prior restraint order like the present, where anyone who breaches the gag order would be in contempt as opposed to a situation where in the absence of a gag order where action for contempt is taken because of and after the actual commission of the contemptous act. Hence the heavy burden imposed on the appellant to show the immediacy of the threat before any such gag order can be entertained. In fact *Nebraska Press Association v Stuart* at p 2807, held that 'of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case. It results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied'.

[33] Further, the learned trial judge said that a pre-emptive prior restraint is necessary in situations:

(a) to prevent an immediate threat or a real and substantial risk of serious prejudice to the administration of justice in the relevant proceedings;

(b) when there is the absence of other alternative measures; and

(c) it must be proportionate in reference to the competing interests of free speech and risk of prejudice to a fair trial.

The above are the tests formulated to determine whether a prior restraint gag order is necessary in a given situation. We will elaborate on whether the appellant has satisfied the above threshold in the later part of this judgment.

WHETHER SUB JUDICE RULE APPLIES

[34] The rule on sub judice seeks to safeguard the sanctity of court proceedings and to ensure that an accused gets a fair trial in a court of law. Decision of court should be free from irrelevant extraneous considerations but purely based on evidence brought before it. The learned trial judge laid down key considerations associated with the rule on sub judice, namely:

(a) to prevent persons involved in the proceedings such as witnesses and jurors from being influenced by the prejudicial publications;

(b) to avoid prejudgment of court decisions; and

(c) to stop others from usurping the judicial functions of the courts.

[35] The sub judice rule is of common law origin and has always been concerned with criminal trials as the ultimate decision maker as to fact is the panel of jurors which comprised laymen who are non professionals. Hence, the danger of these lay persons who are untrained in law being exposed to unfair or

prejudicial comments and statements, which might affect their minds in their deliberation of the case which may affect a fair trial to the accused persons.

[36] However, gone are the days of jury trials in this country. This is pertinent in the evaluation of whether there is a real and substantial risk of a serious prejudice to a fair trial of the appellant. Although our country has been rid of jury trials, the learned trial judge was of the view that the rule of sub judice is still applicable in Malaysia except that it is more circumscribed in the Malaysian Legal System. As stated by the learned judge that it is the basic constitutional framework of this country that it is the judicial institution that deals with the issues presented before the courts for determination. *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 and *Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 reaffirmed this principle that judicial power rests with the judiciary and no other and it continues to be enshrined in art 121(1) of the Federal Constitution. The criminal trials in this country is being conducted by a Judge sitting alone, who is duty bound to only consider the evidence that is before the court. Therefore the likelihood of prejudice from negative publications would not have its effect in a non jury trial of the appellant.

[37] The learned trial judge also recognised that notwithstanding the absence of the jury trials which would remove the concerns about the possibility of decision makers being influenced by extrinsic matters, publications and statements which can still be shown to carry a real and substantial risk of serious prejudicing and pre judging the issues at stake before the courts, may still be in criminal contempt of undermining the course of justice (para 71 of the grounds). This is especially true when one of the key considerations of the sub judice rule is to prevent the usurpation of the role of the courts in adjudicating disputes including criminal trials. Hence even in the absence of jury trials the due administration of justice could still be adversely affected if the media were unfettered to discuss matters and evaluate the evidence adduced in court in an ongoing trial and comment on the credibility of the testimony of witnesses, and suggests what ought to be done by the prosecutors, counsel and the judge, even condemning them, are state of things which should not be tolerated in any judicial jurisdiction (see *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54).

[38] The Federal Court in *Loot Ting Yee v Tan Sri Sheikh Hussain bin Sheikh Mohamed & Ors* [1982] 1 MLJ 142 has the occasion to consider the category of contempt which is based on conduct which prejudges any issue pending before the court. The Federal Court held that by 'prejudgment is meant, of course, a publication which takes up a stand as to which party in a given case is

right or wrong either in toto or on a particular issue of the case (refer to *Attorney General v Times Newspapers Ltd*). A

[39] The learned trial judge also considered the concern on the unwarranted publicity influencing the witnesses as stated in *Loot Ting Yee v Tan Sri Sheikh Hussain bin Sheikh Mohamed & Ors*. However, that is being taken care of, as, ultimately, the prospective or potential witnesses will not be improperly influenced in any way. The witnesses would be subjected to examination, cross examination and reexamination and the judge will be the ultimate decision maker as to the witnesses' credibility and reliability. Subsequently the decision of the judge will be subjected to an appeal process until the apex court, which consists of different other individual judges. B C

[40] We do not find any flaw in the reasoning of the learned judge in this respect and we are in agreement with the learned trial judge that the sub judice rule applies in this country despite the absence of jury trials nowadays. D

WHETHER THE APPELLANT HAD MADE OUT A CASE TO WARRANT A PRIOR RESTRAINT ORDER: E

[41] Although we agreed with the learned trial judge and the appellant that the court in this country has the jurisdiction to grant a prior restraint order as to prejudicial publications which affects a fair trial of the accused persons, it does not mean that the prayers sought for by the appellant ought to be allowed. The court in *Loot Ting Yee v Tan Sri Sheikh Hussein bin Sheikh Mohamed & Ors* provides a guide as to what can amount to contempt, namely, whether the risk of prejudice to a fair and proper trial of the pending legal proceedings is serious, real or substantial. The learned trial judge considered the tests which was formulated by the Canadian Supreme Court in *Dagenais v Canadian Broadcasting Corporation* [1994] 3 SCR 835 which was followed by *Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor* [2012] 7 MLJ 657 which had formulated the principles of the common law rule governing the issuance of publication bans in a manner that reflects the principles of the Canadian Charter of Human Rights, which is: F G

> A publication ban should only be ordered when: H
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably alternative measures will not prevent such risk; and
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> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. I

These are the principles which had been adopted as a basis to decide whether there is contempt in the nature of sub judice rule (as to the facts of the case in question). Although the test therein is in regards to a contempt which had been

committed, unlike the present where the application was in the nature of a prior restraint order, however the test should not be any different and the learned trial judge had referred to what was said in *Sahara India Real Estate Corp Ltd*:

> 30. The question of prior restraint arose before this Court in 1988, in the case of *Reliance Petrochemicals Ltd v Proprietors of Indian Express Newspapers Bombay (P) Ltd* AIR 1989 SC 190 in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was sub judice in this Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be 'based on reasonable grounds for keeping the administration of justice unimpaired' and that, *there must be reasonable ground to believe that the danger apprehended is real and imminent. The Court went by the doctrine propounded by Holmes J of 'clear and present danger'.* This Court treated the said doctrine as the basis of balance of convenience test. Later on, the injunction was lifted after subscription to debentures had closed.

[42] A perusal of the grounds of judgment of the learned trial judge shows that the learned trial judge had given due and adequate consideration and finally came to the conclusion that upon his evaluation, no clear evidence, has been shown in the affidavit in support (other than the applicant's own averments), that the various publications and reports complained of, can be said to present an immediate threat of a real and substantial risk of serious prejudice to the appellant's right to a fair trial or to the administration of justice.

[43] The learned trial judge had considered the voluminous documents exhibited in the affidavits of the appellant which contain the various written articles and comments with varying degree of relevance to the subject matter of the impending criminal trial of the appellant. He mentioned on the emphasis given by the appellant's counsel on the articles and online portal news reports which were exhibited and found objectionable by the appellant, including the multitude of comments. A selection were read out at the hearing by the counsel for the appellant in the High Court. There are comments which was shown by the appellant to be blatantly prejudicial, grossly unfair, disdainful, utterly rude to the point of being crude. However, it was the findings of the learned trial judge that these were almost personal comments expressed anonymously which could and probably should be rejected outright. Hence the learned trial judge found that the argument 'that the risk of prejudice is substantial is on the contrary, rendered much weakened'. Premised on the aforesaid evaluation of evidence, the learned trial judge found that there is no basis for the pre-emptive restraint order.

[44] Even more crucial, based on the exhibits, which show the widespread pervasive and accusatory publicity that was generated and probably by the *Sarawak Report* has been in the public domain as far back as 2014. This was affirmed by the appellant in his affidavit in support at para 10. These publications have been there for a long time, thus negating the element of immediacy of the threat of real risk of serious prejudice to a fair trial of the appellant.

[45] The learned trial judge also considered the interviews which were given by the appellant, his family members and counsel which has been extensively published, in an attempt to answer to the allegations hurled against the appellant, which also attracted public and media interest both national and internationally as compared to the current allegations against the appellant which surfaced for a number of years before the application herein. The learned trial judge found that this suggest the existence of a balance reporting of the rival views on the matter. Support for this can be found in the affidavit of the appellant where he averred that he gave interviews to the press in order to offset public opinion against him. Premised on these state of affairs, the learned trial judge found that the foundation for the application herein weakened, as it renders the risk of serious prejudice to his trial is far from being apparent.

[46] It also cannot be assumed that, if not for the interim gag order granted on 4 July 2018 there would have been a wide and unfair publicity after the registration of the four initial charges against the applicant. Further no action was taken by the appellant against the alleged transgressions.

[47] It is the finding of the learned trial judge, which we agree as it is a finding of fact, that the proposed pre-emptive restraint order appears more to protect the appellant's reputation and standing as a former leader of the nation rather than safeguarding the administration of justice. There is nothing to show that the learned trial judge was plainly wrong in his findings.

[48] This certainly is consistent with the essence of the general observation of Lord Reid in the House of Lords' case of *Attorney General v Times Newspapers Ltd* [1973] 3 All ER 54 when he stated:

> The law on this subject (ie contempt) is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be a real prejudice to the administration of justice.

A **[49]** There is nothing in the publicity that cast aspersions on the integrity of the administration of the criminal justice system and neither is there a threat to the character and status of the court as a court of justice. Neither would it have an effect on the rights of the appellant in having a fair trial.

B **[50]** In any event, the appellant is not without remedy for any contemptuous or defamatory publications which appear in the media whether mainstream or the alternative. Contempt laws and defamation laws are readily available, which renders the order sought for the pre-emptive restraint order less compelling.

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[51] Although the court has the power to issue a prior gag order in the nature of a prior restraint, in light of the application is for an order to prevent future or potential publications which may be prejudicial to his case, as opposed to dealing with a transgression which has already being committed, the applicant bears a heavy burden to prove to the court that the fair and proper trial of the issues in the pending action would be in any way hampered or adversely affected by the publications. There must also be a balancing act of competing interests between the rights of a fair trial and the freedom of free speech and publication and show absence of available remedies to the appellant under the law of contempt and defamation.

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[52] For the courts to grant the prior gag order under such circumstances is disproportionate to the freedom of speech and curtails public discussion on matters of public interest merely based on unfounded allegation of an immediate threat of a real risk of serious prejudice to a fair trial of the appellant.

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[53] Further, the fact of the absence of the jury trials would make it more difficult for the appellant to establish the case of a gag order against the publication and discussion of the criminal charges against the appellant due to the difficulty to establish 'an immediate threat of a real and substantial risk of serious prejudice to the due administration of a fair trial' (see para 73 of the grounds of judgment).

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H **[54]** We therefore agree with the learned trial judge that banning discussions and publications of matters concerning the proceedings in terms of the application as per the notice of motion, would potentially infringe the fundamental rights principle of open justice system as encapsulated in s 15 of the Courts of Judicature Act 1964 which requires the court to be open and public. Nonetheless, we agree that there are exceptions to the requirement of open justice in cases involving public security and public safety and offences involving children. The concept of open justice in courts was stated in *Sahara India Real Estate Corp Ltd* which is based on the provisions in their Contempt of Courts Act 1971. But what is pertinent that was ruled in that case is with

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regards to the open justice in courts 'which permits fair an accurate reporting of court proceedings to be published. The media has the right to know what is happening in courts and to disseminate the information to the public which enhances the public confidence in the transparency of court proceedings'.

[55] Hence, the learned trial judge was not wrong when he found that ultimately the proportionality of the prior restraint order sought by the applicant must be considered in respect of the contention of an immediate threat of a real and substantial risk of a serious risk to a fair trial as against free speech and expression. In balancing the constitutional conflict between achieving a fair trial to the appellant on the one hand and upholding freedom of speech and expression on the other, the learned trial judge was of the view that, in our jurisdiction, greater emphasis should be given on the principle of the freedom of free speech and expression and that of the open justice system. We have no reasons to depart from such findings.

[56] The extent of media publicity and campaign does not necessarily and automatically mean that there would be serious prejudice to the criminal proceedings. The case of *Nebraska Press Association v Hugh Stuart* (1976) 427 US 539 is instructive where the US Supreme Court observed that pre trial publicity, even if deemed to be concentrated and pervasive, could not be readily said to result in an unfair criminal trial.

[57] Although the courts in this country are cloaked with the power to grant pre-emptive restraint gag order, such powers should and would only be exercised in the special circumstances as aforesaid.

[58] Additionally the prior restraint order sought for by the applicant, by the prayers 'any person who shall publish and/or cause to be published in the media' if granted would have the effect directed to the world at large. As was held in *Attorney General v Leveller Magazine Ltd and others* [1979] 1 All ER 745, the court has no power to grant orders against the public at large a prohibition against the publication that all disobedience would automatically constitute a contempt. The proposed restraint order sought for, lacks precision and too wide in scope and cannot be enforced effectively and especially reports published outside the country but are readable and accessible by the public in the country. The appellant's affidavit in support shows that many of the publications and remarks were done by foreign media based outside Malaysia. Hence the difficulty of enforcing the orders against foreign media, if granted. It would render the orders granted, an exercise in futility.

[59] It is also to be observed that the scope of the order applied for in the notice of motion does not correspond to the prayers as applied in the notice of motion. In the affidavit in support, the applicant averred that he is not praying

for fair and accurate reporting to be restrained and that the prohibition should apply to publication and comments which would be favourable to the applicant as well. Hence it appears that the scope of the gag order stated in the notice of motion is inconsistent with the averments in the affidavit in support of the applicant, which shows that the application is not supported by the affidavit in support.

[60] For the above reasons we do not find that the learned trial judge had erred in his refusal to grant the pre-emptive restraint order as prayed for, by the appellant. The appellant failed to fulfill the threshold as aforesaid.

[61] In fact, counsel for the appellant at the submission stage of the appeal before us, has conceded that the appellant has failed to meet the threshold for a prior restraint gag order.

WHETHER THE LEARNED TRIAL JUDGE ERRED WHEN HE DISMISSED THE APPLICATION AFTER HE HAD AGREED ON THE SUBMISSION BY COUNSEL FOR THE APPELLANT ON THE TWO ISSUES TO BE DETERMINED

[62] It was argued before us by counsel for the appellant that, when the learned judge made findings that the courts in this country has the jurisdiction to grant a pre-emptive restraint order and that the sub judice rule applies although jury trial is no longer practiced in our country, it means that the learned trial judge and the appellant is on the same page. Further it was also argued that if one is to look at paras 44, 46–47, 50 and 72 of the grounds of judgment of the learned trial judge, he has given 'directions' of what the public can or cannot do in making comments on the case involving the appellant to avoid being hauled up for contempt. According to the counsel for the appellant, these alleged 'directions' as can be discerned from paras 44, 46–47, 50 and 72 from the grounds of judgment show that impliedly the learned trial judge had allowed prayer 1 of the notice of motion and given directions as prayed for.

[63] Therefore it was submitted by the appellant that since the two issues are in favour of the appellant and the directions have been granted by the learned trial judge which is in accord to what was prayed for in prayer 1 of the notice of motion, the appeal herein by the appellant ought to be allowed. Therefore, the learned trial judge erred when he dismissed the application by the appellant.

[64] However, we fail to see how that can be so, for the following reasons:

(a) the learned trial judge's conclusion on the two issues, namely the jurisdiction issue and the sub judice issue do not determine the application in favour of the appellant. Although the two issues were

decided in accord to the submission by the counsel of the appellant, however at the end of it all, the appellant failed to meet the threshold for a prior restraint or a pre-emptive gag order to be granted. It is clear in the grounds of the learned trial judge that such relief sought for, is unfounded. Hence the appellant did not get what was prayed for;

(b) paras 44, 46–47, 50 and 72 of the grounds of judgment, are the learned trial judge's views as to what can amount to contempt and restrictions associated with the concept of sub judice. Those paragraphs can never be regarded as 'directions' by the learned trial judge. Any orders or directions by courts or judges must be clear, precise and specific. What counsel for the appellant is urging us to do is to 'cull' from the aforesaid paras 44, 46–47, 50 and 72 of the grounds of judgment and to come up with the 'directions' as prayed for in prayer 1 of the notice of motion. Our perusal of the said paragraphs show that it cannot be taken as directions by the learned trial judge. If it is so, the learned trial judge would have directed his mind to prayer 1 and said so in the grounds. To infer/imply from the aforesaid paragraphs that it was the intention of the learned trial judge to give such directions as envisaged by prayer 1 of the notice of motion is reading something which is not there. Hence we are not persuaded by the arguments from counsel of the appellant nor are we attracted to the invitation by learned counsel to devise our ingenuity to 'cull' from the paragraphs, directions to the public as to what they can/cannot do with regard to prejudicial publications; and

(c) it is to be observed that if one is to follow the argument of the counsel for the appellant, it would appear that the directions would be issued out and directed to the public as to what comments can/cannot be made with regards to the case. Problem would arise as to enforcement. This is unlike an order of court directed to parties of a suit where the matter has been adjudicated between them. Here the court is issuing out orders in the form of 'directions' to the public at large who are not parties to the action herein. The pre requisite of contempt proceedings is that the orders which was allegedly breached must be first served to the person in whose instance the contempt proceedings is brought. How is such service to be done on the public at large. Can it be presumed that public is deemed to have read the orders of 'directions' via the law reports or the grounds of the learned trial judge and that it can be enforced against the public for having breached the so called 'directions'? We think not.

[65] Counsel for the appellant submitted an example of 'directions' which was issued by the Attorney General of UK to the public to take care when commenting online ahead of the Hillsborough inquest into the deaths of 96 people who died as a result of events at Hillsborough. Inquest would be heard by a coroner together with a jury. There, the attorney general drew the attention of the public to the risk of publishing material, including online,

which could create a substantial risk that the course of justice in the inquests may be seriously impeded or prejudiced. Herein lies the difference, namely the so called 'directions' were issued by the attorney general in the form of an 'advisory note' and that it is in relation to an inquest which involved a jury. It is more a guideline to the public. It is a far cry from the 'directions' which the appellant is seeking from this court in the notice of motion.

[66] Hence we found that the argument in this regard, by the appellant has no basis. We cannot, by any account agree with the submission that based on the grounds of the learned trial judge, it is imperative on us to allow the appeal. In fact it is the reverse.

WHETHER IN GRANTING THE SPECIFIC 'DIRECTIONS' AS STATED IN PARAS 44, 46–47 AND 50 IN THE GROUND OF JUDGMENT IS COVERED BY THE 'ALLOMNIBUS PRAYER' IN PRAYER 3 OF THE NOTICE OF MOTION

[67] We did alert counsel for the appellant as to the generality of the prayer I of the notice of motion and whether the appellant is in a position to seek for specific directions as envisaged in paras 44, 46–47, 50 and 72 of the grounds of judgment. Counsel for the appellant attached a proposed 'directions' which the appellant is seeking under prayer 1 of the notice of motion from this court after our query as to what are the proposed 'directions' which could be issued out under the same.

[68] Counsel for the appellant brought our attention to prayer 4 of the notice of motion which states:

> 4. Any further relief or order that this Honourable Court deems fit and proper to be given in the interest of justice.

and submitted that this court has the power to issue such specific 'directions' pursuant to prayer 4 although prayer 1 is couched in general terms, as this court has wide powers to grant any order that may seem just.

[69] Counsel for the appellant also find support in s 60(1) of the CJA 1964 which states:

> 60(1) At the hearing of an appeal the Court of Appeal shall hear the appellant or his advocate, if he appears, and, if he thinks fit, the respondent or his advocate, if he appears, and may hear the appellant or his advocate in reply, and the Court of Appeal may thereupon confirm, reverse or vary the decision of the High court, or may order a retrial or may remit the matter with the opinion of the Court of Appeal thereon to the trial court, *or may make such other order in the matter as to it may seem just*, and may by that order exercise any power which the trial court might have exercised.

This provision, according to the counsel for the appellant allow this court to grant such specific directions.

[70] Counsel for the appellant referred us to the case of *Johnbosco Chinedu Augustine v Public Prosecutor* [2016] MLJU 1685; [2016] 3 CLJ 732 but that case involved a situation where the trial judge failed to provide any grounds for convicting the accused and the Court of Appeal exercised its power under s 60(1) to remit the case for retrial before a different judge. There the liberty of a person was at stake and it cannot be equated to the situation in our present case. The case of *Chiu Nang Hong v Public Prosecutor* [1965] 1 MLJ 40 is of no help to the appellant in this regard.

[71] Further, counsel for the appellant cited s 60(4) of the CJA 1964 which states:

> (4) The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

In support of the aforesaid section, the case of *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 was quoted where the Federal Court approved the approach in *Harris Solid State (M) Sdn Bhd & Ors v Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489. In *Harris Solic State (M) Sdn Bhd & Ors v Bruno Gentil Pereira & Ors*, this court adopted the following passage from the judgment of Ramaswami J in *Ganesh Ram v Baikunthesh Prasad Singh & Ors* AIR 1951 Pat 291 (at p 293) explaining the scope of O 41 r 33 of the Indian Civil Procedure Code from which s 69(4) of the CJA 1964 was drawn:

> The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the appellate court ample discretion to pass any decree or make any order to prevent the ends of justice from being defeated. Having regard to the wide language of the rule, it is not expedient to lay down any hard and fast rule regarding its true scope. Involving as it does an exercise of judicial discretion, the question whether the court should exercise the powers in a particular case would no doubt depend upon the special facts and circumstances of the case. It may be conceded that the discretion is not to be exercised in an arbitrary manner nor in such a way as to abrogate the other provisions of the Code with respect to the institution of appeals and cross-objections and the like. *But there is ample authority for the view that the power contained in r 33 extends to those cases where as a result of the appellate court's interference with the decree in favour of the appellant, further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience (see for instance, Jawahar Banu v Shujaat Husain Beg* [1921] All ER 367 and *Gangadhar v Banabashi* [1914] Cal 722). (Emphasis added.)

[72] It is to be borne in mind that the situation where the courts in the above cases made further orders to do justice, are in situations where the judgment was in favour of the plaintiff. In *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789 it was stated in the judgment:

> ... *R v A-G, ex p Imperial Chemical Industries Plc* [1986] 60 TC 1 at p 64: '[I]t does seem to me that it must be wrong in principle when a litigant has *succeeded in making good his case and has done nothing to disentitle himself to relief,* to deny him any remedy unless, at any rate, there are extremely strong reasons in public policy for doing so. (Emphasis added.)

Similarly in the case of *Ng Kim Moi (P) & Ors v Pentadbir Tanah Daerah, Seremban, Negeri Sembilan Darul Khusus (Negeri Sembilan Township Sdn Bhd & Anor, proposed intervenors)* [2004] 3 MLJ 301, it was held that:

> [46] Further, this court has ample jurisdiction and power under s 69(4) of the Courts of Judicature Act 1964 to 'make any order which ought to have been given or made, and make such further or other orders as the case requires ...
>
> [47] Acting on the foregoing authorities, it is plain that this court is empowered *to grant the appellants such relief as is appropriate* in law to do justice in accordance with the circumstances of the case.

The invocation of s 60(1) of the CJA 1964 and the omnibus prayer 4 in the notice of motion to allow for specific directions to be issued out for prayer 1 in the notice of motion, to our mind, is inappropriate as the appellant failed to establish that he is entitled to the relief prayed for, namely the prior restraint gag order. All the cases above are cases where judgment was accorded in favour of the plaintiff and s 60(1) of the CJA 1964 was invoked to do justice to the plaintiff for further orders to give effect to the judgment in favor of the plaintiff. That is not the situation for the appellant here.

[73] Therefore, based on the aforesaid, we find that there was sufficient judicial appreciation by the learned trial judge of the facts and evidence before him and that it has not been shown where he has gone wrong in arriving at his decision. His findings is supported by the evidence and the authorities and there has been no misdirection in law or that he has misdirected himself. He has taken a positive evaluation of the evidence before him and careful analysis of the authorities submitted. Therefore, the findings of the learned trial judge do not warrant any appellate intervention.

CONCLUSION

[74] We find no error by the learned trial judge in fact or in law in his decision to warrant any appellate intervention. We therefore unanimously dismissed the appeal and affirmed the decision of the learned High Court judge.

Appeal dismissed and decision of learned trial judge affirmed.

Reported by Ahmad Ismail Illman Mohd Razali